1986

Charles G. Oman v. The Industrial Commission of the State of utah, Peaboy Coal Company, Old Republic Insurance Company, and the Second Injury Fund of the State of Utah : Brief of Appellant

Utah Supreme Court

Virginius Dabney; Dabney and Dabney, P.C.; Attorneys for Plaintiff.
David L. Wilkinson; Attorney General of the State of Utah; Henry K. Chai II; Snow, Christensen and Martineau; Attorney for Defendants.

459

860192

IN THE SUPREME COURT OF THE STATE OF UTAH

CHARLES G. OMAN, Plaintiff, -vs- THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH, PEABODY COAL COMPANY [Employer], OLD REPUBLIC INSURANCE COMPANY [Insurance Carrier for the Employer], and the SECOND INJURY FUND OF THE STATE OF UTAH, Defendants.	:	Case No. 860192 Priority No. 6

BRIEF OF THE PLAINTIFF

ON WRIT OF REVIEW TO THE SUPREME COURT

OF THE STATE OF UTAH

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TABLE OF CONTENTS

Page

Table of Contents.....i

Table of Authorities.....ii

Statement of Issues Presented on Appeal.....1

Statement of Facts.....1

Summary of Argument.....6

Argument:.....6

I THE PLAINTIFF IS ENTITLED TO HAVE HIS PERMANENT TOTAL DISABILITY AWARD RECOMPUTED TO PROVIDE FOR THE COMMENCEMENT OF BENEFITS ON APRIL 22, 1976, THE DAY FOLLOWING HIS LAST DAY OF WORK.....6

II THE PLAINTIFF IS ENTITLED TO STATUTORY INTEREST ON HIS PERMANENT TOTAL DISABILITY AWARD.....9

Conclusion.....10

Certificate of Service.....11

Addendum.....12

On June 15, 1975, and notwithstanding his physical and mental problems, the Plaintiff returned to work in the mines where he continued to work without significant interruption until April 21, 1976. Tr. Vol. I, p. 136. During that time, Plaintiff continued to obtain chiropractic adjustments for his physical problems and therapy for his depression.

In May, 1976, Plaintiff sought follow-up medical treatment for his back which had some limitation in motion and additional tenderness in his left buttocks. He also had decreased sensation over the lateral aspect of his calf and foot on the left side. Tr. Vol. II, pp. 167 and 409; and Vol. I, p. 47.

Subsequently, on June 29, 1976, a three-level fusion was performed by Dr. Thomas E. Soderberg at the L.D.S. Hospital in Salt Lake City, Utah. Tr. Vol. I, p. 48; and Vol. II, p. 167. Because two of the levels failed, a second surgery was performed on December 1, 1977, where Plaintiff's back was again re-fused. Tr. Vol. II, pp. 190-191 and 409.

On March 21, 1977, and as a result of those two surgeries, the Industrial Commission approved a Compensation Agreement awarding Plaintiff a 25% permanent partial impairment of the whole body for his orthopedic problems. Tr. Vol. I, p. 24.

Over five years later, on June 11, 1982, Plaintiff filed an Application for Hearing requesting an additional permanent partial impairment award for his psychiatric problems and, also, requesting consideration of a permanent total disability award. Tr. Vol. I, p. 37.

Dr. Potts, Plaintiff's treating physician of approximately five years, confirmed Plaintiff's permanent total disability status by letter on September 24, 1984 by stating that he was "... unable to work or perform steadily...." and that he doubted that "... his position [would] improve". Tr. Vol. II, p. 156. Dr. Bradford D. Hare of the University of Utah Pain Clinic confirmed Plaintiff's inability to work, and indicated that the Plaintiff is impaired in social, family and vocational functioning, in a medical report of February 13, 1985. This report further substantiated Plaintiff's total disability status. Tr. Vol. II, p. 613.

Ms. JoAnn Pace of the Four Corners Community Mental Health Center in Castle Dale, Utah also confirmed Plaintiff's permanent total disability status by letter of May 21, 1985 indicating that "... my impression at this time is that the employee is suffering from post traumatic stress disorder with depression. His rumination of the traumatic event, his anxiety and severe physical pain could most definitely prevent him from working at this time". Tr. Vol. II, pp. 613-614.

And finally, Dr. Ronald G. Rubin, a psychiatrist in Price, Utah, in a letter of July 10, 1985, pursuant to a Division of Rehabilitation referral, indicated that Plaintiff was neither rehabilitable now nor was he expected to be so in the future, was not employable now or in the future, and was not able to partake in a new vocation, and was in fact 100% disabled. Tr. Vol. II, p. 614.

On October 9, 1984, the Administrative Law Judge denied Plaintiff's claim to an additional award for his psychiatric impairment, but found him "... tentatively permanently and totally disabled and referred [him] to the Division of Rehabilitation Services for evaluation, training and certification as required by Section 35-1-67, U.C.A." Tr. Vol. II, p. 412.

On July 31, 1985, the Utah State Board of Education, Division of Rehabilitation Services, found that Plaintiff was ineligible for rehabilitation because his handicap was "too severe" and a recent psychiatric evaluation revealed that he had "... no significant work potential...." In addition to Plaintiff's physical and mental impairments, that Division also found that he had borderline intellectual functioning and reading skills primarily as a result of his dropping out of school in the tenth grade. The Division issued the Section 67 certification by concluding that there was no "... reasonable expectation that vocational rehabilitation services [could] benefit [him] in terms of employability." Tr. Vol. II, p. 562.

On December 11, 1985, the Administrative Law Judge entered Findings of Fact, Conclusions of Law and an Order finding that the Plaintiff was "... entitled to benefits for permanent total disability benefits from and after July 31, 1985...." Tr. Vol. II, p. 564. The date chosen by the Adminsitrative Law Judge for the commencement of benfits was the date of the Section 67 Division of Rehabilitation certification of non-entitlement to rehabilitation services. Tr. Vol. II, p. 562. No mention was

made in the Order for the payment of interest on unpaid benefits then long since due. Tr. Vol. II, pp. 561-565.

On December 19, 1985, Plaintiff filed his Motion for Reconsideration/Motion for Review challenging the onset date of permanent total disability benefits, and the lack of an award for statutory interest on the unpaid but due benefits. Tr. Vol. II, pp. 569-573. Plaintiff argued that computing permanent total disability benefits based upon the date of the rehabilitation letter is inconsistent with longstanding Industrial Commission policy wherein permanent total disability benefits onset dates are computed from the date of Plaintiff's industrial accident, or the date on which the Plaintiff last worked, whichever is later. Tr. Vol. II, p. 569. In addition, Plaintiff argued that statutory interest is awarded on permanent total disability benefits as it is on any other unpaid but due Workers' Compensation benefits. Tr. Vol. II, p. 572.

On March 13, 1986, the Industrial Commission granted in part and denied in part Plaintiff's Motion for Reconsideration/Motion for Review. Tr. Vol. II, pp. 574-576. Specifically, the Industrial Commission held "... that the first date of medical confirmation of the Applicant's permanent total disability status is a more appropriate date to begin permanent total disability benefits..." (Tr. Vol. II, p. 576) and "... that an award for interest is inappropriate...." Tr. Vol. II, p. 576. No explanation for either of these two conclusions was given in the Order.

Plaintiff timely petitioned this Court for review of the Industrial Commission's final administrative decision. Tr. Vol. II, p. 578.

SUMMARY OF ARGUMENT

It is Plaintiff's contention that the Industrial Commission acted arbitrarily and capriciously when it ordered the payment of permanent total disability benefits to commence on September 24, 1984. Plaintiff contends that the proper date for the commencement of such benefits is April 22, 1976 which is the last day Plaintiff was able to work as a coal miner and was forced out of the work force by his industrial injury. All of the medical and other evidence submitted supports Plaintiff's argument that his disabling symptoms are attributable to his 1975 industrial injury. To select a date other than April 22, 1976 is an arbitrary and capricious act.

And finally, Plaintiff contends that the Industrial Commission erred in refusing to award interest in compliance with Utah Code Annotated §35-1-78 (1981). Continued refusal of the Industrial Commission to comply with the statutory requirements and this Court's interpretations thereof underscores the Industrial Commission's tenuous position in this case.

ARGUMENT

I

THE PLAINTIFF IS ENTITLED TO HAVE HIS PERMANENT TOTAL DISABILITY AWARD RECOMPUTED TO PROVIDE FOR THE COMMENCEMENT OF BENEFITS ON APRIL 22, 1976, THE DAY FOLLOWING HIS LAST DAY OF WORK

The remedial nature of the Utah Workmen's Compensation Act is to assure, among other things, that workers who are injured while performing their duties are compensated for the loss suffered as a result of an industrial accident. The Workmen's Compensation Act provides for various types of benefits to which employees are entitled as soon as a compensable injury removes them from the work force.

Utah Code Annotated §35-1-64 (1973) mandates when compensation under the Workmen's Compensation Act must commence. This commencement date, which is no later than three days after the injury, or sooner, supports Plaintiff's position that the critical date is when the injured employee was forced out of the work force by his injury.

In this case, there is no dispute that Plaintiff's last day of work as a coal miner was April 21, 1976. More importantly, there is no dispute that all the medical reports submitted herein conclude that it was the industrial injury sustained by Plaintiff on May 12, 1975 that rendered him permanently totally disabled and has forced him out of the work force. All of Plaintiff's disabling symptoms, according to the uncontradicted medical reports, are attributable to his 1975 industrial injury.

The Industrial Commission, without any expressed reason, arbitrarily and capriciously selected September 24, 1984, as the date from which permanent total disability benefits shall be paid notwithstanding the fact that he has not worked for over a decade!

It should be noted that Plaintiff's argument is based upon the long adhered to Indutrial Commission rule that payment of benefits shall commence on the date of the accident or the last day an injured employee worked, whichever is later. Notwithstanding that rule, the Industrial Commission for the first time in 70 years has arbitrarily and capriciously discerned that a new rule should be implemented regarding identifying the date for the commencement of the payment of benefits.

What the Industrial Commission is so vainly attempting to conceal is its effort to arbitrarily limit the financial exposure of the Second Injury Fund by fiat rather than by seeking appropriate legislative relief, thereby, once again, ignoring the recommendation of this Court that the Legislature is the appropriate forum to limit the financial exposure of the Second Injury Fund.

By arbitrarily and capriciously picking a later onset date, the financial exposure of the Second Injury Fund can be limited without the authority of any statutory, regulatory or case law. In fact, this arbitrary change in policy overrules 70 years of the Commission's own procedural history.

This arbitrary and capricious choice of the Industrial Commission is wholly without cause and is not supported by any substantial evidence. Billings Computer Corporation v. Tarango, Utah, 674 P.2d 104 (1983). To preserve the remedial nature of the Workmen's Compensation Act, and even the integrity of the Industrial Commission, this Court must reverse the Commission's decision in this case. To fulfill the purpose of the Workmen's

Compensation Act and secure workers from becoming objects of charity by making reasonable compensation, Platiniff urges this Court to rule that the onset date for the payment of benefits to which he is entitled be the date he was forced out of the work force by the industrial accident.

II

THE PLAINTIFF IS ENTITLED TO STATUTORY INTEREST ON HIS PERMANENT TOTAL DISABILITY AWARD

Utah Code Annotated §35-1-78 (1981) provides that awards made by the Industrial Commission shall include interest at the rate of 8%, from the date each benefit payment would have otherwise become due and payable.

Invoking this clear and unambiguous statute merely requires that the Plaintiff demonstrate his entitlement to benefits. Once an employee is entitled to benefits, the statute requires that interest at the stated rate be paid. This interpretation was recently approved by this Court in Marshall v. Industrial Commission, Utah, 704 P.2d 581 (1985).

Despite the clear and unambiguous language of the statute and this Court's interpretation of it, the Industrial Commission refused to award Plaintiff interest on the benefits awarded. Such action by the Industrial Commission forces workers, such as Plaintiff, to seek redress in this Court. A statute which is so simple and clear as to purpose should not result in an appeal.

Plaintiff submits that the Industrial Commission has once again demonstrated its intention to refuse to follow the dictates of this Court and the Legislature when it declined to award in-

terest. Plaintiff further submits that the Industrial Commission's action in refusing to pay interest is additional evidence of its arbitrary attempt to limit the financial exposure of the Second Injury Fund.

CONCLUSION

The Plaintiff respectfully requests that the Industrial Commission be directed, once again, to comply with the Workers' Compensation statutory requirements of the law as they have been interpreted by the decisions of this Court. The clear and consistent failure of the Industrial Commission to do so only exacerbates injured workers' compensation rights, violates the remedial nature of Workers' Compensation legislation, and further and unnecessarily results in needless appeals being taken to this Court for the purpose of reversing arbitrary and capricious decisions of the Industrial Commission. The final administrative decision of the Industrial Commission should be reversed and remanded with direction to recompute the Plaintiff's permanent total disability benefits from April 22, 1976, with interest from that date as required by the Code.

DATED this 18th day of August, 1986.

DABNEY & DABNEY, P.C.

VIRGINIUS DABNEY, ESQ.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I served four (4) true and correct copies of the foregoing document, postage prepaid, on this the 18th day of August, 1986, upon the following:

David L. Wilkinson, Esq.
ATTORNEY GENERAL OF THE STATE OF UTAH
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Henry K. Chai III, Esq.
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DABNEY & DABNEY, P.C.

VIRGINIUS DABNEY, ESQ.
Attorneys for Plaintiff

ADDENDUM

BEFORE THE INDUSTRIAL COMMISSION OF UTAH

CHARLES OMAN,

Applicant,

vs.

PEABODY COAL COMPANY,
(Employer)
OLD REPUBLIC COMPANIES,
(Insurance Carrier)

Defendant

COMPENSATION AGREEMENT

WHEREAS, Charles Oman sustained a personal injury by accident arising out of and in the course of his employment on the 12th day of May, 1975 while employed by Peabody Coal Company; which accident has been duly reported to the Industrial Commission of the State of Utah. According to the physician's reports and agreement between the parties hereto, said Applicant sustained, as a result of said accident, temporary total disability and/or permanent partial disability, as well as incurring medical and/or hospital expenses, as hereinafter set forth:

1. Temporary total disability from May 12 to June 15, 1975 less two days and April 30, 1976 to December 31, 1976 inc. payable at the rate of $95.33 per week for a total of $5622.11.

*2. Permanent partial disability based on 78 weeks payable at the rate of $95.33 per week beginning January 1, 1977 for a total of 7435.74. Said permanent partial disability consists of the specific loss as follows:
25% permanent partial disability

3. Recapitulation of compensation benefits paid in connection with this claim:

(a) Medical--Hospital and Miscellaneous Incurred	$ 4335.41		
Paid to Date	$ 4335.41		Note 1
Balance (if any) Due		$ None	
(b) Total Weekly Compensation Benefits Due	$ 3772.34		
Paid to Date	$ 5622.11		
Balance (if any) Due		($ 1849.77)	Note 2
(c) Total Medical and Compensation Due per this Compensation Agreement:		$ 5585.97	

NOW THEREFORE, in consideration of the payment of the amount stated in Section 3 above--as provided by law--the Applicant hereby releases Defendants from any further responsibility in connection with said accident except as may be changed from time to time under the powers of the Industrial Commission of Utah to retain continuing jurisdiction to modify awards and extend medical benefits.

It is understood that this Agreement becomes binding and effective only when approved by a member of the Industrial Commission of Utah.

x Charles Oman
Charles Oman, Applicant

Insurance Carrier/Employer

Approved this 21 day of March, 1977

By
ADMINISTRATIVE LAW JUDGE

Note 1: Travel and per diem of $361.90 was also paid.

* Supporting medical evidence of permanent partial disability must accompany this form.

Note 2: 31 weeks compensation was paid at rate of $155.00 in error.

NOTE: Original will be retained by the Commission. Signed copies will be returned to the Insurance Carrier.

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 82002249

CHARLES G. OMAN, Applicant, vs. PEABODY COAL COMPANY and/or OLD REPUBLIC and SECOND INJURY FUND, Defendants.	*	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on September 24, 1984 at 1:00 p.m. o'clock. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Richard G. Sumsion, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by Virginius Dabney, Attorney at Law.

The defendants, Peabody Coal Company and/or Old Republic Insurance, were represented by Henry Chai, Attorney at Law.

The Second Injury Fund was represented by Gilbert Martinez, Administrator.

FINDINGS OF FACT:

1. The applicant herein was injured in an industrial accident on May 12, 1975 during the course of his employment by Peabody Coal Company. The occurrence of the accident is not questioned but the extent of injuries sustained as a result of the accident are subject to considerable doubt.

2. The accident involved a cave-in in which three of the miners lost their lives and others were injured. One of those who was killed was only a few feet away from the applicant and was trying to rescue others at the time he was killed. The applicant may not have been able to prevent him from getting into the situation leading to his death, but apparently the applicant felt that he could have prevented him from doing so and this has caused him to have a lot of guilt feelings. After this employee was killed in the cave-in

the applicant turned to run and was struck across the back by one of the mine timbers. One might suspect that the applicant would have been seriously injured by this timber but there was certainly no immediate indication of such. The applicant did say that he experienced a lot of low back pain but on the other hand he continued working in the search and rescue effort for three or four more hours and when he finally did go to the Emery Medical Center his main complaints were emotional not physical. The night of the accident, he was treated for hyperventilation and given Valium and the Clinic did not even make note of any low back pain or injury. In fact, the applicant was in such a state of emotional unrest and confusion that he drove to Page, Arizona for unknown reasons. His wife was so concerned about him that she followed him to Page. However, the applicant was seen by a chiropractor in Price on May 15, 1975 and was treated for "traumatic lumbo sacral sprain with radiculitis unilateral on the left side." He continued seeing a chiropractor quite regularly for the next several months. Because of his depression, he also went to the Four Corners Mental Health Clinic in Price. There he complained of restlessness and feelings of anxiety and nervousness and an unwillingness to go back into the mine. He complained of not sleeping and having dreams of the horrible incident at the mine. He was also having marital problems and he embarked upon a course of psychotherapy for the purpose of getting him back into the mine and helping him with his marriage. This program was successful and he did return to work in the mine by June 15. He then worked without interruption until around April of 1976. During that time he continued to obtain some chiropractic adjustments but it is unknown as to just what extent or at what frequency these adjustments were administered. The records of the chiropractor, now deceased, have not been located.

3. There is no indication that the applicant saw a medical doctor regarding his back problems until May 4, 1976, approximately one year after the accident, at which time he saw Dr. N.K. Dean in Price. Dr. Dean referred him to Dr. Soderberg in Salt Lake City. Dr. Soderberg saw him for the first time on May 7, 1976. He was noted at that time to have mild limitation of motion in his back and tenderness in the left buttock. He had decreased sensation over the lateral aspect of the calf and foot on the left side but his reflexes and straight leg raising tests were normal. Shortly thereafter a fusion of his back was recommended but he wanted to wait a while longer. The fusion was performed on June 29, 1976. This was a three level fusion, two of which apparently failed making it necessary to refuse the back and this was done in December of 1977.

4. After the first surgery, the applicant entered into a Compensation Agreement with the insurance carrier dated March 21, 1977. This agreement acknowledged that he had received temporary total disability compensation from May 12 to June 15, 1975 less two days and again from April 30, 1976 to December 31, 1976. He also received compensation for permanent partial disability based on a rating of 25% of the whole person. At that time, no mention was made of any psychiatric problems and no claim for such was submitted. The applicant has never returned to work following the surgery

of June 29, 1976. Prior to the surgery in December of 1977, the applicant filed an application for additional benefits specifically noting that a fusion had failed and that further surgery was recommended. Liability for the additional claim was denied but later the insurance company reversed its position and paid for the additional medical expenses and for additional temporary total disability through September 7, 1978. No additional permanent partial disability was paid because Dr. Soderberg indicated the fusion had been made solid by the second surgery and there had been no increase in the permanent partial disability.

5. The applicant received social security disability compensation for approximately four years but these payments were discontinued in 1980. The termination of the applicant's social security disability benefits may have prompted his filing for further workmen's compensation benefits. The applicant's claim for such was filed on August 19, 1982 and his claim at that time was for additional permanent partial disability or permanent total disability.

6. From the evidence presented, it is clear there has been no increase in the applicant's permanent partial impairment due to his back injury. This was rated at 25% by Dr. Soderberg in 1977 and he reconfirmed his opinion as late as 1982. The only evidence of increased impairment relates to the ratings recently assigned to his psychiatric impairment which was not rated by any physician until March of 1983. This rating was assigned by Dr. Frank Dituri, a specialist in internal medicine, based upon his application of the criteria set forth in the Guides to the Evaluation of Permanent Impairment published by the American Medical Association and his assessment of the applicant's psychiatric problems. This evaluation was made without the benefit of any of the records from the Four Corners Medical Center and Dr. Dituri acknowledged that it would be very helpful to have these records. The applicant was later seen by Dr. Jack L. Tedrow, a psychiatrist, who essentially confirmed Dr. Dituri's earlier assessment of a 25% psychiatric impairment. Dr. Dituri recently responded to a request from the Administrative Law Judge relative to the onset of this impairment and it is obvious from his letter dated August 7, 1984 that he made a mistake with respect to the date of the industrial accident. In his original report and in two places in his August 7, 1984 report he refers to the accident as having occurred on March 12, 1979. Obviously, his records to finding no evidence of ratable impairment as early as January, 1977 is based on his incorrect assumption that this was prior to the industrial accident when in fact it was subsequent to the accident and the records of the Four Corners Medical Health Center make it rather clear that the applicant did in deed have significant psychiatric problems immediately following the industrial accident on March 12, 1975.

7. In retrospect, with the benefit of hindsight, it appears rather evident that the applicant's present problems have been greatly magnified by several factors pertaining to the manner in which his case has been handled.

It seems rather apparent that the applicant's physical impairment resutling from his industrial accident was not particularly significant. For more than a year after the accident his physical complaints apparently warranted no more than periodic chiropractic adjustments and he was able to return to work and perform his duties in the mine. Similarly, his understandable psychiatric problems and phobic reaction to working in the mine were significantly reduced by the treatment he received at the Four Corners Mental Health Center. The consultation received at the Mental Health Center did enable him to return to the mine and resume his employment and one might easily have concluded at that time that the industrial accident had little long range significance. Now, nine years later, the applicant considers himself permanently and totally disabled.

There is absolutely no evidence that the applicant benefited in any way from the first surgical procedure and the second surgical procedure was only beneficial in the sense of correcting the pseudo-arthrosis. The surgeries took him out of the work environment and created a real inability to work for a period of time, and this, superimposed upon his psychiatric problems, have combined to convince him that he is indeed unemployable.

After this long length of time there is probably no realistic hope for reversing this dismal attitude problem although proper psychotherapy at the appropriate time may well have been successful. When the applicant became disabled as a result of his surgeries, there was obvious justification for his determination of total disability by the Social Security Administration but this only compounded the problems because it removed him from active management as a workmen's compensation claim and did nothing to restore him to suitable gainful employment at a time when this was realistically possible. The applicant complains that his social security disability benefits were terminated but in all likelihood the more realistic tragedy is that he was kept on social security disability as long as he was. At the time of the accident, the applicant was a young man of only 35 years of age and his prospects for rehabilitation should have been excellent. The fact that he remains unemployed nine years later is an indictment on the system and the applicant's failure or inability to understand the adverse impact of that system upon him. Consequently, the Administrative Law Judge finds that the applicant was by no means rendered permanently and totally disabled as a result of the industrial accident even though the accident combined with the circumstances that have followed may well have relegated him to that status.

8. Because of the foregoing, it is necessary for the Administrative Law Judge to view the applicant's claim in three different perspectives: (1) Whether or not his present claim for additional compensation based upon his psychiatric problems is nothing more than a modification of the 1977 compensation agreement and therefore not subject to any statute of limitations, (2) Whether or not the psychiatric impairment represented a significant change in the applicant's condition so as to warrant an award of additional compensation under the continuing jurisdiction of the Commission conferred by Section 35-1-78 and, if so, whether or not the Commission still has jurisdiction to enter such an award more than nine years after the accident, and (3) Whether or not the applicant can be found permanently and

totally disabled as a result of his industrial accident at this time, in which case his claim would not be subject to the eight year statute of limitations set forth in Section 35-1-66, U.C.A. Addressing the applicant's claim from the first two perspectives mentioned, Section 35-1-78 confers continuing jurisdiction on the Commission to make such modification or change with respect to former findings or orders as it may from time to time feel justified. In the annotation regarding the case of Spencer v. Industrial Commission 4 Ut 2d 185, 290 P2d 692, it is noted that even though the "doctrine of res judicata...is not in the strict sense applicable to proceedings before the Industrial Commission (.)(T)his does not mean that an applicant can reapply to the Commission for a new determination upon the same facts merely because he may be dissatisfied with his former order, but it does mean once the application has been filed and the Commission's jurisdiction invoked, it has authority to entertain further proceedings to deal with any substantial changes or unexpected developments that may arise as a result of the injury. On this criteria, the Administrative Law Judge finds that this is not an appropriate case for further consideration under Section 35-1-78. It is rather evident that the same facts have prevailed for approximately the last seven years. Even though the psychiatric impairment was not rated until relatively recently, the impairment itself was obviously in place long ago.

The foregoing is deemed dispositive of the first two perspectives. As to the third perspective, that of the applicant's claim for permanent total disability, the Administrative Law Judge finds that the facts warrant a tentative finding of permanent and total disability simply because the applicant has not been gainfully employed for the past eight years. The Administrative Law Judge is firmly convinced that had appropriate measures been taken, the applicant would have been an excellent candidate for rehabilitation and would be working today. However his attitude problems may be so deeply entrenched that rehabilitation will be difficult if not impossible but his age at least is in his favor. At age 44, he is still a relatively young man. It is not enough to presume that the applicant can obtain suitable gainful employment and under circumstances of this type it is incumbent upon the defendants to demonstrate that he is capable of rehabilitation. This concept appears to be clearly supported by the case of Brundidge v. IML Freight, 622 P2d 790 (1980).

9. No compensation for permanent total disability is to be awarded until a final determination is made relative to whether or not the applicant is permanently and totally disabled. In the meantime, he should be referred to the Division of Rehabilitation Services for evaluation, training and certification as required by Section 35-1-67, U.C.A. It is the recommendation of the Administrative Law Judge that the defendants have the applicant evaluated at a pain clinic of their choosing and this should be done before the evaluation by Rehabilitation Services. Obviously, any other rehabilitation services the defendants wish to employ would be appropriate.

CONCLUSIONS OF LAW:

The applicant is entitled to a tentative finding of permanent and total disability and referral to rehabilitation services as required by Section 35-1-67, U.C.A. The facts of this case do not justify a modification of the prior compensation agreement entered into in 1977 and the Administrative Law Judge does not believe the Commission has jurisdiction to consider a claim for increased permanent partial impairment at this late date. This case is clearly distinquishable from the Garnier case on which applicant relies. Failure to enter an award within the eight year period prescribed by statute in the instant case was not attributable to the Commission's inability to do so.

ORDER:

IT IS THEREFORE ORDERED that the applicant be found tentatively permanently and totally disabled and referred to the Division of Rehabilitation Services for evaluation, training and certification as required by Section 35-1-67, U.C.A.

IT IS FURTHER ORDERED that all other issues, including a final determination of the applicant's candidacy for rehabilitation, attorney's fees to be awarded herein, and evidence from any other source pertaining to applicant's employability be specifically deferred to a later time. A further hearing on the issue of employability will be determined after all of the relevant information has been submitted.

Richard G. Sumsion
Administrative Law Judge

Passed by the Industrial Commission of Utah
Salt Lake City, Utah, this 9th day of October, 1984.
ATTEST:

Linda J. Strasburg, Commission Secretary

CERTIFICATE OF MAILING

I certify that on October 9, 1984 a copy of the attached ORDER was mailed to the following persons at the following addresses, postage paid:

Charles G. Oman
P.O. Box 853
Castle Dale, Ut. 84513

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Gilbert Martinez, Administrator, Second Injury Fund

Dir X-ray back 10-5-84

THE INDUSTRIAL COMMISSION OF UTAH

By Sherry

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 82002249

CHARLES G. OMAN,	*	AMENDED
Applicant,	*	FINDINGS OF FACT
vs.	*	CONCLUSIONS OF LAW
PEABODY COAL COMPANY and/or OLD REPUBLIC and SECOND INJURY FUND,	*	AND ORDER
Defendants.	*	

FINDINGS OF FACT:

1. The applicant herein was injured in an industrial accident on May 12, 1975 during the course of his employment by Peabody Coal Company. The occurrence of the accident is not questioned but the extent of injuries sustained as a result of the accident are subject to considerable doubt.

2. The accident involved a cave-in in which three of the miners lost their lives and others were injured. One of those who was killed was only a few feet away from the applicant and was trying to rescue others at the time he was killed. The applicant may not have been able to prevent him from getting into the situation leading to his death, but apparently the applicant felt that he could have prevented him from doing so and this has caused him to have a lot of guilt feelings. After this employee was killed in the cave-in the applicant turned to run and was struck across the back by one of the mine timbers. One might suspect that the applicant would have been seriously injured by this timber but there was certainly no immediate indication of such. The applicant did say that he experienced a lot of low back pain but on the other hand he continued working in the search and rescue effort for three or four more hours and when he finally did go to the Emery Medical Center his main complaints were emotional not physical. The night of the accident, he was treated for hyperventilation and given Valium and the Clinic did not even make note of any low back pain or injury. In fact, the applicant was in such a state of emotional unrest and confusion that he drove to Page, Arizona for unknown reasons. His wife was so concerned about him that she followed him to Page. However, the applicant was seen by a chiropractor in Price on May 15, 1975 and was treated for "traumatic lumbo sacral sprain with rediculitis unilateral on the left side." He continued seeing a chiropractor quite regularly for the next several months. Because of his depression, he also

went to the Four Corners Mental Health Clinic in Price. There he complained of restlessness and feelings of anxiety and nervousness and an unwillingness to go back into the mine. He complained of not sleeping and having dreams of the horrible incident at the mine. He was also having marital problems and he embarked upon a course of psychotherapy for the purpose of getting him back into the mine and helping him with his marriage. This program was successful and he did return to work in the mine by June 15. He then worked without interruption until around April of 1976. During that time he continued to obtain some chiropractic adjustments but it is unknown as to just what extent or at what frequency these adjustments were administered. The records of the chiropractor, now deceased, have not been located.

3. There is no indication that the applicant saw a medical doctor regarding his back problems until May 4, 1976, approximately one year after the accident, at which time he saw Dr. N.K. Dean in Price. Dr. Dean referred him to Dr. Soderberg in Salt Lake City. Dr. Soderberg saw him for the first time on May 7, 1976. He was noted at that time to have mild limitation of motion in his back and tenderness in the left buttock. He had decreased sensation over the lateral aspect of the calf and foot on the left side but his reflexes and straight leg raising tests were normal. Shortly thereafter a fusion of his back was recommended but he wanted to wait a while longer. The fusion was performed on June 29, 1976. This was a three level fusion, two of which apparently failed making it necessary to refuse the back and this was done in December of 1977.

4. After the first surgery, the applicant entered into a Compensation Agreement with the insurance carrier dated March 21, 1977. This agreement acknowledged that he had received temporary total disability compensation from May 12 to June 15, 1975 less two days and again from April 30, 1976 to December 31, 1976. He also received compensation for permanent partial disability based on a rating of 25% of the whole person. At that time, no mention was made of any psychiatric problems and no claim for such was submitted. The applicant has never returned to work following the surgery of June 29, 1976. Prior to the surgery in December of 1977, the applicant filed an application for additional benefits specifically noting that a fusion had failed and that further surgery was recommended. Liability for the additional claim was denied but later the insurance company reversed its position and paid for the additional medical expenses and for additional temporary total disability through September 7, 1978. No additional permanent partial disability was paid because Dr. Soderberg indicated the fusion had been made solid by the second surgery and there had been no increase in the permanent partial disability.

5. The applicant received social security disability compensation for approximately four years but these payments were discontinued in 1980. The termination of the applicant's social security disability benefits may have prompted his filing for further workmen's compensation benefits. The applicant's claim for such was filed on August 19, 1982 and his claim at that time was for additional permanent partial disability or permanent total disability.

6. From the evidence presented, it is clear there has been no increase in the applicant's permanent partial impairment due to his back injury. This was rated at 25% by Dr. Soderberg in 1977 and he reconfirmed his opinion as late as 1982. The only evidence of increased impairment relates to the ratings recently assigned to his psychiatric impairment which was not rated by any physician until March of 1983. This rating was assigned by Dr. Frank Dituri, a specialist in internal medicine, based upon his application of the criteria set forth in the Guides to the Evaluation of Permanent Impairment published by the American Medical Association and his assessment of the applicant's psychiatric problems. This evaluation was made without the benefit of any of the records from the Four Corners Medical Center and Dr. Dituri acknowledged that it would be very helpful to have these records. The applicant was later seen by Dr. Jack L. Tedrow, a psychiatrist, who essentially confirmed Dr. Dituri's earlier assessment of a 25% psychiatric impairment. Dr. Tedrow recently responded to a request from the Administrative Law Judge relative to the onset of this impairment and it is obvious from his letter dated August 7, 1984 that he made a mistake with respect to the date of the industrial accident. In his original report and in two places in his August 7, 1984 report he refers to the accident having occurred on March 12, 1979. Obviously, his reference to "finding no evidence of ratable impairment as early as January, 1977", is based on his incorrect assumption that this was prior to the industrial accident when in fact it was subsequent to the accident and the records of the Four Corners Medical Health Center make it rather clear that the applicant did in deed have significant psychiatric problems immediately following the industrial accident on March 12, 1975. A subsequent letter from Dr. Tedrow dated October 12, 1984 confirmed this typographical error and the pre-existing problem but he could not rate it.

7. In retrospect, with the benefit of hindsight, it appears rather evident that the applicant's present problems have been greatly magnified by several factors pertaining to the manner in which his case has been handled. It seems rather apparent that the applicant's physical impairment resutling from his industrial accident was not particularly significant. For more than a year after the accident his physical complaints apparently warranted no more than periodic chiropractic adjustments and he was able to return to work and perform his duties in the mine. Similarly, his understandable psychiatric problems and phobic reaction to working in the mine were significantly reduced by the treatment he received at the Four Corners Mental Health Center. The consultation received at the Mental Health Center did enable him to return to the mine and resume his employment and one might easily have concluded at that time that the industrial accident had little long range significance. Now, nine years later, the applicant considers himself permanently and totally disabled.

There is absolutely no evidence that the applicant benefited in any way from the first surgical procedure and the second surgical procedure was only beneficial in the sense of correcting the pseudo-arthrosis. The

surgeries took him out of the work environment and created a real inability to work for a period of time, and this, superimposed upon his psychiatric problems, have combined to convince him that he is indeed unemployable.

After this long length of time there is probably no realistic hope for reversing this dismal attitude problem although proper psychotherapy at the appropriate time may well have been successful. When the applicant became disabled as a result of his surgeries, there was obvious justification for his determination of total disability by the Social Security Administration but this only compounded the problems because it removed him from active management as a workmen's compensation claim and did nothing to restore him to suitable gainful employment at a time when this was realistically possible. The applicant complains that his social security disability benefits were terminated but in all likelihood the more realistic tragedy is that he was kept on social security disability as long as he was. At the time of the accident, the applicant was a young man of only 35 years of age and his prospects for rehabilitation should have been excellent. The fact that he remains unemployed nine years later is an indictment on the system and the applicant's failure or inability to understand the adverse impact of that system upon him. Consequently, the Administrative Law Judge finds that the applicant was by no means rendered permanently and totally disabled as a result of the industrial accident even though the accident combined with the circumstances that have followed may well have relegated him to that status.

8. Because of the foregoing, it is necessary for the Administrative Law Judge to view the applicant's claim in three different perspectives: (1) Whether or not his present claim for additional compensation based upon his psychiatric problems is nothing more than a modification of the 1977 compensation agreement and therefore not subject to any statute of limitations, (2) Whether or not the psychiatric impairment represented a significant change in the applicant's condition so as to warrant an award of additional compensation under the continuing jurisdiction of the Commission conferred by Section 35-1-78 and, if so, whether or not the Commission still has jurisdiction to enter such an award more than nine years after the accident, and (3) Whether or not the applicant can be found permanently and totally disabled as a result of his industrial accident at this time, in which case his claim would not be subject to the eight year statute of limitations set forth in Section 35-1-66, U.C.A. Addressing the applicant's claim from the first two perspectives mentioned, Section 35-1-78 confers continuing jurisdiction on the Commission to make such modification or change with respect to former findings or orders as it may from time to time feel justified. In the annotation regarding the case of Spencer v. Industrial Commission 4 Ut 2d 185, 290 P2d 692, it is noted that even though the "doctrine of res judicata...is not in the strict sense applicable to proceedings before the Industrial Commission (.)(T)his does not mean that an applicant can reapply to the Commission for a new determination upon the same facts merely because he may be dissatisfied with his former order, but it does mean once the application has been filed and the Commission's jurisdiction

invoked, it has authority to entertain further proceedings to deal with any substantial changes or unexpected developments that may arise as a result of the injury. On this criteria, the Administrative Law Judge finds that this is not an appropriate case for further consideration under Section 35-1-78. It is rather evident that the same facts have prevailed for approximately the last seven years. Even though the psychiatric impairment was not rated until relatively recently, the impairment itself was obviously in place long ago.

The foregoing is deemed dispositive of the first two perspectives. As to the third perspective, that of the applicant's claim for permanent total disability, the Administrative Law Judge finds that the facts warrant a tentative finding of permanent and total disability simply because the applicant has not been gainfully employed for the past eight years. The Administrative Law Judge is firmly convinced that had appropriate measures been taken, the applicant would have been an excellent candidate for rehabilitation and would be working today. However his attitude problems may be so deeply intrenched that rehabilitation will be difficult if not impossible but his age at least is in his favor. At age 44, he is still a relatively young man. It is not enough to presume that the applicant can obtain suitable gainful employment and under circumstances of this type it is incumbant upon the defendants to demonstrate that he is capable of rehabilitation. This concept appears to be clearly supported by the case of Brundige v. IML Freight, 622 P2d 790 (1980).

9. No compensation for permanent total disability is to be awarded until a final determination is made relative to whether or not the applicant is permanently and totally disabled. In the meantime, he should be referred to the Division of Rehabilitation Services for evaluation, training and certification as required by Section 35-1-67, U.C.A. It is the recommendation of the Administrative Law Judge that the defendants have the applicant evaluated at a pain clinic of their choosing and this should be done before the evaluation by Rehabilitation Services. Obviously, any other rehabilitation services the defendants wish to employ would be appropriate.

CONCLUSIONS OF LAW:

The applicant is entitled to a tentative finding of permanent and total disability and referral to rehabilitation services as required by Section 35-1-67, U.C.A. The facts of this case do not justify a modification of the prior compensation agreement entered into in 1977 and the Administrative Law Judge does not believe the Commission has jurisdiction to consider a claim for increased permanent partial impairment at this late date. This case is clearly distinquishable from the Garnier case on which applicant relies. Failure to enter an award within the eight year period prescribed by statute in the instant case was not attributable to the Commission's inability to do so.

ORDER:

IT IS THEREFORE ORDERED that the applicant be found tentatively permanently and totally disabled and referred to the Division of Rehabilitation Services for evaluation, training and certification as required by Section 35-1-67, U.C.A.

IT IS FURTHER ORDERED that all other issues, including a final determination of the applicant's candidacy for rehabilitation, attorney's fees to be awarded herein, and evidence from any other source pertaining to applicant's employability be specifically deferred to a later time. A further hearing on the issue of employability will be determined after all of the relevant information has been submitted.

Richard G. Sumsion
Administrative Law Judge

Passed by the Industrial Commission of Utah
Salt Lake City, Utah, this 25th day of October, 1984.
ATTEST:

Linda J. Strasburg, Commission Secretary

CERTIFICATE OF MAILING

I certify that on October 23, 1984 a copy of the attached AMENDED ORDER was mailed to the following persons at the following addresses, postage paid:

Charles G. Oman
P.O. Box 853
Castle Dale, Utah 84513

Virginius Dabney
Attorney at Law
Suite 412, 136 South Main
Salt Lake City, Utah 84101

Henry Chai
Attorney at Law
P.O. Box 3000
Salt Lake City, Utah 84101

Gilbert Martinez, Administrator, Second Injury Fund

THE INDUSTRIAL COMMISSION OF UTAH

By Sherry

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 82002249

CHARLES G. OMAN,	*	
Applicant,	*	SUPPLEMENTAL
vs.	*	FINDINGS OF FACT
PEABODY COAL COMPANY and/or OLD REPUBLIC INSURANCE and SECOND INJURY FUND,	*	CONCLUSIONS OF LAW AND ORDER
Defendants.	*	

HEARING:	Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on September 24, 1984, at 1:00 p.m.; same being pursuant to Order and Notice of the Commission.
BEFORE:	Richard G. Sumsion, Administrative Law Judge.
APPEARANCES:	The Applicant was present and represented by Virginius Dabney, Attorney at Law The Defendants Peabody Coal Company and/or Old Republic Insurance were represented by Henry K. Chai, II, Attorney at Law. The Second Injury Fund was represented by Gilbert A. Martinez, Administrator.
FURTHER HEARING:	Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on November 14, 1985, at 10:00 a.m.; same being pursuant to Order and Notice of the Commission.
BEFORE:	Richard G. Sumsion, Administrative Law Judge.
APPEARANCES:	The Applicant was present and represented by Virginius Dabney, Attorney at Law The Defendants Peabody Coal Company and/or Old Republic Insurance were represented by Henry K. Chai, II, Attorney at Law. The Second Injury Fund was represented by Erie V. Boorman, Administrator.

FINDINGS OF FACT:

1. Findings of Fact, Conclusions of Law, and Order were entered in this matter on October 9, 1984, and an Amended Order was entered on October 23, 1984. Insofar as the Findings of Fact expressed in the two prior Orders are not inconsistent with the Findings made herein, the same are incorporated herein by reference as though fully set forth.

2. The original Order made a tentative finding that the Applicant was permanently and totally disabled, and he was referred to the Division of Rehabilitation Services for evaluation, training, and certification as required by Section 35-1-67, U.C.A. There was a specific finding made that no compensation for permanent total disability was to be awarded until a final determination was made relative to that issue.

3. At the last hearing on November 14, 1985, evidence was introduced relative to the rehabilitation evaluation. The Applicant underwent feasibility studies and was placed in a program where he received tutoring in basic skills. He made positive but slow progress for a while; but finally on July 31, 1985, Rehabilitation Services certified that the Applicant did not meet or no longer met the legal requirement of a reasonable expectation that vocational rehabilitation services would benefit him in terms of employability. The reason for the certification that the Applicant is not a good candidate for rehabilitation appears to be threefold: (1) He has borderline intellectual functioning and reading skills; (2) he suffers from a long-term depressive neurosis; and (3) he lacks funds that might otherwise enable him to pursue a long-term rehabilitation program.

4. At the last hearing the Defendants presented a substantial amount of evidence relative to the Applicant's activities over the past several years. The thrust of this evidence was to establish that the Applicant was in fact a partner with his wife in the operation of Kelly's Bar in Castledale, Utah, and that he had also formerly been involved with his wife in the operation of Chick's Fish 'N Chips. The evidence also strongly implies that the Applicant derived an unspecified amount of income from Christmas tree sales. The Applicant testified that the Christmas tree sales were actually an attempt on the part of his teenage daughter to earn some income and that he was not involved in this business even though many of the customers wrote out checks in his name in payment for the trees. He further testified that the bar and restaurant operations were operated solely by his wife and that his name appeared on licenses, tax returns, sales invoices, lease agreements, et cetera, only for the purpose of credit or other business needs but was never intended to be an actual partnership. Some of the evidence presented showed rather clearly that a lot of personal expenses were being run through the business accounts, and the evidence rather clearly indicated the Applicant spent quite a bit of time at the bar and that perhaps he even helped out on occasion to a limited extent. It seems rather clear from the evidence that the townspeople regarded the Applicant and his wife as the owners and

operators of these businesses even though the Applicant's time involvement was much less than that of his wife.

5. Tax returns filed by the Applicant and his wife were submitted after the hearing for the years 1979 through 1984. In each case these were joint returns, but for each year they showed the income and expenses of Kelly's Bar as a sole proprietorship operated by Charles Oman. The returns reflect substantial gross receipts from the bar, but the net income for the years 1979 through 1982 showed either a loss or only nominal net income. Clearly, if the only thing derived by the Applicant and his wife from the operation of the bar was the amount reflected as net profit on the tax return, the operation of the bar could not be justified. The net profit would not even have been the equivalent of a minimum wage paid to part-time hired help. The average net profit for the years 1979 through 1983 was only 2.57 percent of gross sales. There was an unexplained increase in net profit during 1983 and 1984 even though gross sales remained about the same as they had been previously. The net profit in 1983 jumped to 12.86 percent of gross sales, and the net profit jumped to 20.07 percent in 1984. The last two figures are believable and would justify the operation of the business. Although the income from the first four years is suspect, there may be an adequate explanation; but such an explanation is not deemed important to the issue relative to the Applicant's permanent total disability.

6. All of the evidence presented from the Applicant's doctors and from rehabilitation counselors supports the Applicant's claim for permanent total disability. The prospects of successful rehabilitation are not good, but there is the suggestion that such might still be accomplished if the Applicant had sufficient funds to sustain him during a long-term rehabilitation program.

7. A considerable amount of time was spent at the last hearing reviewing a substantial number of checks made out to the Applicant, many of which were under $100.00 but some of which were in excess of $100.00 and in some cases more than $500.00. The Applicant said that these did not represent income in any way but were checks simply written out by customers who wanted cash and the Applicant and his wife were willing to cash these checks for them. The Administrative Law Judge is hardly convinced of any sound business purpose being furthered by this practice, but there is no specific evidence of any other purpose. These checks are in addition to the hundred or so checks written out to the Applicant for Christmas trees. Most of the Christmas trees appear to have sold for $15.00, with the price range being $10.00 to $20.00.

8. All of the evidence presented by the Defendants was convincing in showing the Applicant is far from being totally invalid. His activity level is such that Dave Owens, a captain in the Emery County Sheriff's Office, did not even know that he was disabled even though he saw him frequently. Lamar Guymon, sheriff of Emery County, testified that he had observed the Applicant limping as he walked but he also saw the Applicant frequently during

the course of a month and knew of his involvement in the operation of Kelly's Bar.

9. In consideration of all of the evidence presented, the Administrative Law Judge finds that the Applicant is permanently and totally disabled, but at the same time believes this determination should be subject to the continuing jurisdiction of the Commission. This is admittedly paradoxical but is based upon the belief that the Applicant's unemployability is in large part a result of his long-term depressive neurosis condition and that such might change if the Applicant had a strong enough desire to become employed despite his known physical limitations. It obviously will not change absent a change in attitude.

10. The Applicant's combined physical and mental impairment is 44 percent of whole body function. The Defendants entered into a compensation agreement with the Applicant in 1977 by which he was paid permanent partial disability for his 25 percent physical impairment, but nothing has ever been paid for his depressive neurosis. The Applicant's rate of compensation was $95.33 per week. This is less than the minimum amount payable as of the time the Applicant was certified as not being a candidate for rehabilitation on July 31, 1985. The minimum rate in effect at that time was $120.00 per week. The Defendant Insurance Carrier and its insured have no further liability in this matter except for the payment of ongoing medical expenses because the Applicant did not become permanently and totally disabled until after the expiration of the initial six-year period.

CONCLUSIONS OF LAW:

The Applicant is entitled to benefits for permanent total disability from and after July 31, 1985, subject to the continuing jurisdiction of the Commission to review and amend as circumstances may require.

ORDER:

IT IS THEREFORE ORDERED that the Administrator of the Second Injury Fund prepare the necessary vouchers directing the State Treasurer, as Custodian of the Second Injury Fund, to place Applicant on the Second Injury Fund payroll and to pay Applicant compensation at the rate of $120.00 per week commencing July 31, 1985, and continuing thereafter at intervals of not more than every four weeks until further Order of the Commission. The accrued amount shall be payable in a lump sum.

IT IS FURTHER ORDERED that the Defendants Peabody Coal Company and/or Old Republic Insurance pay all medical expenses incurred as the result of this accident, said expenses to be paid in accordance with the Medical and Surgical Fee Schedule of this Commission.

IT IS FURTHER ORDERED that Virginius Dabney, attorney for the Applicant, be paid the sum of $5,994.00, payable directly by the Applicant in installments of such amount as may be agreeable between the Applicant and his attorney, but no less than $450.00 out of the accrued amount payable and thereafter in installments of no less than $80.00 per month. Should there be any failure to pay as agreed or per the minimum stated above, there shall be a suspension of benefits to the Applicant and benefits will be payable to his attorney as may be ordered by the Commission.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof, specifying in detail the particular errors and objections, and unless so filed, this Order shall be final and not subject to review or appeal.

Richard G. Sumsion
Administrative Law Judge

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 11th day of December, 1985.

ATTEST:

Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on December 11, 1985, a copy of the attached Supplemental Order in the case of Charles G. Oman issued December 11, 1985, was mailed to the following persons at the following addresses, postage paid:

Erie V. Boorman, Administrator
Second Injury Fund
P.O. Box 45580
Salt Lake City, UT 84145-0580

Henry K. Chai, II, Attorney at Law
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Virginius Dabney, Attorney at Law
Kearns Building, Suite 412
136 South Main Street
Salt Lake City, UT 84101

Charles G. Oman
P.O. Box 853
Castledale, UT 84513

THE INDUSTRIAL COMMISSION OF UTAH

By DeAnn Seely

VIRGINIUS DABNEY, ESQ., #0795
DABNEY & DABNEY, P.C.
Attorneys for Applicant
Kearns Building - Suite 412
136 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 328-9000

UTAH STATE INDUSTRIAL COMMISSION

DIVISION OF WORKERS' COMPENSATION AND OCCUPATIONAL DISEASE AND DISABILITY

CHARLES G. OMAN, Applicant, -vs- PEABODY COAL COMPANY [Employer], OLD REPUBLIC INSURANCE COMPANY [Insurance Carrier for the Employer], and the SECOND INJURY FUND OF THE STATE OF UTAH, Defendants.	MOTION FOR RECONSIDERATION/ MOTION FOR REVIEW Case No. 82002249

COMES NOW the Applicant, pursuant to the Utah Workers' Compensation and Occupational Disease statutes, and the Rules and Regulations of the Utah Industrial Commission, inter alia, and requests the Industrial Commission to review the Supplemental Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge of December 11, 1985 relative to the onset date of permanent total disability benefits, and interest, only, and in support thereof, alleges and represents as follows:

1. That the Supplemental Order of December 11, 1985 specifically provides that the commencement date of permanent total disability benefits is the date of the Rehabilitation Services letter certifying that the Applicant was

DABNEY & DABNEY
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136 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 328-9000

not a candidate for reasonable vocational rehabilitation services, namely July 31, 1985.

2. That computing permanent total disability benefits based upon the date of the rehabilitation letter is inconsistent with long standing Industrial Commission policy wherein permanent total disability benefits onset dates are computed from the date of the employee's industrial accident, or the date the employee last worked, whichever is later. Permanent total disability is computed from that date on a permanent total disability weekly benefits basis with all temporary total and permanent partial disability compensation deducted from that amount for the purpose of determining the continuation date of permanent total disability benefits.

3. That counsel is not aware of any other permanent total disability commencement date in any other claim ever being held to commence with the date of a State Office of Education Rehabilitation Services certification letter, and that the only reason for doing so would be to lessen the financial exposure of employers, and in this case, the Second Injury Fund.

4. That the July 31, 1985 onset date is contrary to numerous findings by the Commission, and other matters contained in the medical evidence which argue for an earlier date, assuming that the computation basis normally used by the Industrial Commission should in one manner or another be modified: specifically, the appropriate dates relative to the permanent total disability question in this case are as follows:

a. The date of the industrial accident was May 12, 1975.

b. The Applicant has not worked since 1976; in fact, the Administrative Law Judge in the Amended Order of October 23, 1984 specifically found that "... the Applicant has not been gainfully employed for the past eight years." Amended Order, p. 5 (emphasis added).

c. The Application alleging permanent total disability is dated June 11, 1982 and it was filed on August 19, 1982.

d. The first hearing held in this matter involving, among other things, the issue of permanent total disability, was held on September 29, 1984.

e. Dr. Potts, the Applicant's treating physician of approximately five years, indicated the Applicant's permanent total disability status on September 24, 1984 by stating that he "... unable to work or perform steadily ..." and that he doubted that "... his position [would] improve". Hearing Exhibit No. A-1.

f. The Administrative Law Judge in the Amended Order of October 23, 1984 specifically concluded that "... the facts warrant a tentative finding of permanent and total disability...." Amended Order, p. 5 (emphasis added).

g. The State Office of Education Rehabilitation Services commenced vocational feasibility studies of the Applicant in October, 1984 and attempted to rehabilitate the Applicant for a period of almost nine months, all without success. See Hearing Exhibit No. A-19.

h. The Administrative Law Judge by letter to the State Office of Education Rehabilitation Services referred the Applicant for vocational rehabilitation by that agency on November 15, 1984.

i. Dr. Bradford D. Hare of the University of Utah Pain Clinic indicated that the Applicant was unable to work, and was impaired in social, family and vocational functioning, in a medical report dated February 13, 1985, further substantiating his total disability status.

j. Ms. JoAnn Pace of the Four Corners Community Mental Health Center in Castle Dale, Utah further substantiated the Applicant's permanent total disability by letter of May 21, 1985 by indicating that "... my impres-

sion at this time is that the Applicant is suffering from past traumatic stress disorder with depression. His rumination of the traumatic event, his anxiety and severe physical pain could most definitely prevent him from working at this time."

k. Dr. Donald L. Ruben, a psychiatrist in Price, Utah, pursuant to a rehabilitation referral, indicated that the Applicant was not rehabilitable now or in the future, was not employable now or in the future, and was not able to partake in a new vocation, and was in fact 100% disabled, in a letter dated July 10, 1985.

l. Even the Administrative Law Judge's Supplemental Order of December 11, 1985 emphasizes that "all of the evidence presented from the Applicant's doctors and from rehabilitation counselors supports the Applicant's claim for permanent total disability" (emphasis added). In this regard, the several medical reports, principally from Dr. Potts [09/24/84], the Four Corners Mental Health agency [05/21/85] and Dr. Ruben [07/10/85], strongly infer that the Applicant was permanently and totally disabled at least as early as September 24, 1984, by medical records and opinions alone!

5. That because the onset date selected by the Administrative Law Judge of July 31, 1985, the date of the State Office of Education Rehabilitation Services certification letter, clearly constitutes an error in law, it is respectfully requested that the onset date be computed in accordance with the usual and customary Industrial Commission practice as referred to above. Unquestionably, the earlier Application date (June 11, 1982), the filing date (August 19, 1982), the first medical opinion letter of permanent total disability (September 24, 1984), and the date of the tentative finding of permanent total disability conclusion by the Administrative Law Judge (October 23, 1984) agree strongly for an earlier onset date. In suggesting these alterna-

tive dates, however, the Applicant is not in any way waiving his position that the usual and customary practice of the Industrial Commission to commence benefits as of the date of the accident, or the date of last employment, with appropriate offsets for temporary total compensation and permanent partial compensation being made, is in reality, the appropriate way to compute permanent total disability benefits owed to Mr. Oman in this case.

6. That in addition, it should also be noted that pursuant to Utah Code Annotated §35-1-78 (1981), the Applicant is also entitled to interest on all amounts from the point in time when they were otherwise due and payable, which such interpretation of Section 78 has recently been upheld by the Utah Supreme Court in the decision of Marshall v. Industrial Commission, (1985). Therefore, to the extent that the Supplemental Order of December 11, 1985 does not include a provision for interest, it should also be accordingly modified.

WHEREFORE, the Applicant respectfully requests that an appropriate and earlier onset date be made in this case, and that an appropriate award be made for interest pursuant to Section 78 in accordance with the Utah Supreme Court recent ruling on that question.

DATED this 19th day of December, 1985.

DARNEY & DARNEY, P.C.

VIRGINIA DARNEY, ESQ.
Attorneys for Applicant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing document, postage prepaid, on this the 19th day of December, 1985, to the following:

Utah Industrial Commission
160 East 300 South
P. O. Box 45580
Salt Lake City, Utah 84145-0580

Erie V. Boorman, Esq.
160 East 300 South
P. O. Box 45580
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SNOW, CHRISTENSEN & MARTINEAU
9 Exchange Place, 12th Floor
P. O. Box 3000
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Mr. Charles G. Oman
P. O. Box 853
Castle Dale, Utah 84513

DARNEY & DARNEY, P.C.

VIRGINIUS DARNEY, ESQ.
Attorneys for Applicant

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 82002249

CHARLES G. OMAN,	*	
Applicant,	*	ORDER
vs.	*	GRANTING
PEABODY COAL COMPANY and/or OLD REPUBLIC INSURANCE and SECOND INJURY FUND,	*	MOTION FOR REVIEW
Defendants.	*	

On December 11, 1985, an Administrative Law Judge of the Commission issued Supplemental Findings of Fact, Conclusions of Law and Order awarding the Applicant in the above captioned case permanent total disability benefits, to be paid by the Second Injury Fund beginning July 31, 1985, the date when the State Office of Education Rehabilitation Services certified that the Applicant was not susceptible to rehabilitation. On December 20, 1985, the Applicant's attorney filed a Motion for Review objecting to the date payments were ordered to begin. The Counsel for the Applicant argues that the Commission practice has been to award permanent total disability benefits either beginning the date the employee was injured, or the date the employee ceased working. The Counsel for the Applicant also requested an award of interest on the benefits awarded. The Commission is of the opinion that an earlier date is appropriate for the beginning of the permanent total disability benefits, however the Commission declines adding interest to the award. A brief review of tha file follows.

The Applicant was injured, while in the course of his employment, on May 12, 1975 in a mine cave-in. The Applicant injured his back, and had two back surgeries as a result. The Applicant also experienced considerable psychiatric problems resulting from the trauma involved in the cave-in (in which several miners were killed). The Applicant returned to work approximately one month after the cave-in, and worked for almost a year afterwards, during which time he saw a chiropractor. In June 1976, the Applicant had back surgery (performed by Dr. T. Soderberg) and the Applicant was deemed stabilized in December 1976. The Defendant/carrier paid temporary total compensation in 1975 and 1976 for the periods the Applicant did not work, and also paid for a 25% permanent partial impairment rated by Dr. Soderberg in December 1976. The Applicant required additional surgery in

December 1977 as a result of non-fusion, and the Defendant/carrier paid for the surgery and the attendant temporary total disability. The Applicant was declared stable in September 1978, and no further permanent partial impairment, beyond the 25% already awarded, resulted.

On August 18, 1982, the Applicant, through counsel, filed an Application for Hearing with the Commission, claiming permanent total disability benefits, or additional permanent partial impairment benefits. In support of the claim, in November 1983, the Counsel for the Applicant submitted two physician reports. Both reports discussed the Applicant's psychiatric impairment resulting from the May 12, 1975 accident, and one of the reports rated the impairment at 25% of the whole man. The Defendants denied a claim for further permanent partial impairment benefits based on the 8 year Statute of Limitation specified in U.C.A. 35-1-66. The Counsel for the Applicant argued that the Statute of Limitation did not apply because the issue was permanent total disability for which the Supreme Court determined no Statute of Limitation applied, and because the Commission had continuing jurisdiction under U.C.A. 35-1-78. A Hearing was held September 24, 1984, and the Administrative Law Judge issued Findings of Fact, Conclusions of Law and Order on October 9, 1984. The Administrative Law Judge made a tentative finding of permanent total disability, and the Applicant was referred to the State Office of Education Rehabilitation Services. On November 14, 1985, a second Hearing was held to allow testimony regarding the Applicant's employability. This issue arose when it was determined the Applicant may have had some involvement in several businesses in which his wife and daughter were engaged.

The final Supplemental Findings of Fact, Conclusions of Law and Order, now at issue, was filed on December 11, 1985. In that Order, the Administrative Law Judge found the Applicant permanently totally disabled as a result of Rehabilitation Services' inability to rehabilitate the Applicant after nearly one year of attempts. The Administrative Law Judge ordered the Second Injury Fund to begin permanent total disability benefits as of July 31, 1985, the date Rehabilitation Services certified the Applicant as not susceptible to rehabilitation. On December 20, 1985, the Commission received the Applicant's Motion for Review arguing for an earlier date when permanent total disability should begin, and requesting an award of interest on the final award. The Counsel for the Applicant submits a long list of alternative earlier dates that should have been selected by the Administrative Law Judge as the beginning of permanent total disability. These include, May 12, 1975 the date of injury; sometime in 1976 when the Applicant ceased working; June 11, 1982 the date of the Application for Hearing; August 19, 1982 the date the Application was filed; September 24, 1984 when the Applicant's treating physician first found the Applicant to be permanently totally disabled; October 23, 1984, the date the Administrative Law Judge tentatively found the Applicant to be permanently totally disabled; November 15, 1984, the date the Applicant was referred to Rehabilitation Services, February 13, 1985, when the

University of Utah Pain Clinic doctor found the Applicant disabled; May 21, 1985, when a community health center employee found the Applicant was prevented from working; and finally, June 10, 1985 when a psychiatrist found the Applicant was not employable or rehabilitative.

The Commission is of the opinion that the first date of medical confirmation of the Applicant's permanent total disability status is a more appropriate date to begin permanent total disability benefits. The Commission therefore finds the benefits should begin as of September 24, 1984. The Commission finds that an award of interest is inappropriate, and therefore the final Commission award is as follows.

IT IS THEREFORE ORDERED that the Administrator of the Second Injury Fund prepare the necessary vouchers directing the State Treasurer, as Custodian of the Second Injury Fund, to place Applicant on the Second Injury Fund payroll and to pay Applicant compensation at the rate of $120.00 per week commencing September 24, 1984, and continuing thereafter at intervals of not more than every four weeks until further order of the Commission. The accrued amount shall be payable in a lump sum.

IT IS FURTHER ORDERED that the Defendants, Peabody Coal Company and/or Old Republic Insurance, pay all medical expenses incurred as the result of this accident, said expenses to be paid in accordance with the Medical and Surgical Fee Schedule of the Commission.

IT IS FURTHER ORDERED that Virginius Dabney, attorney for the Applicant, be paid the sum of $5,994.00, payable directly by the Applicant in installments of such amount as may be agreeable between the Applicant and his attorney, but no less than $450.00 out of the accrued amount payable and thereafter in installments of no less than $80.00 per month. Should there be any failure to pay as agreed or per the minimum stated above, there shall be a suspension of benefits to the Applicant and benefits will be payable to his attorney as may be ordered by the Commission.

Stephen M. Hadley, Chairman

Walter T. Axelgard, Commissioner

Lenice L. Nielsen, Commissioner

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah this
12th day of March, 1986

Linda J. Strasburg, Commission Secretary

CERTIFICATE OF MAILING

I certify that on March 13, 1986, a copy of the attached Granting Motion for Review in the case of Charles G. Oman issued March 13, 1986, was mailed to the following persons at the following addresses, postage paid:

Erie V. Boorman, Administrator of the Second Injury Fund

Henry K. Chai, II, Atty., P.O. Box 3000, SLC, UT 84110

Virginius Dabney, Atty., 136 South Main, Suite 412, SLC, UT 84101

Charles G. Oman, P.O. Box 853, Castledale, Utah 84513

THE INDUSTRIAL COMMISSION OF UTAH

By Carol Olson
Carol Olson